

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

Docket No. 76-1250

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

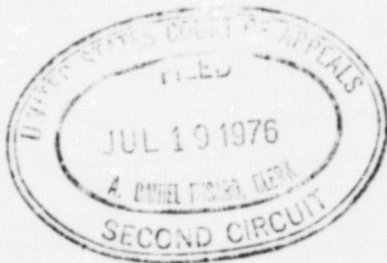
— against —

JOSEPH C. VISPI,

Defendant-Appellant.

Appeal From Orders and Judgment of the United States
District Court for the Western District of New York

APPENDIX



OHLIN, DAMON, MOREY,
SAWYER & MOOT
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RELEVANT DOCKET ENTRIES.

DATE

1974

- February 1 (1) Filed Information.
- February 1 (2) J.S. 2 made.
- April 24 (3) Filed Defendant's notice of motion for Discovery and Inspection; bill of particulars; Disclosure; and Brady material, etc., ret. 5/13/1974 - Rochester.
- April 22 (4) Arraignment. Defendant present with counsel, waives reading of the information and enters a plea of not guilty. Defendant is released on his own recognizance. Motion ret. 5/13/1974.
- May 7 (5) Filed Government's response to Defendant's Motion for discovery and inspection, etc.
- May 13 (6) Motion by Defendant for Discovery, Inspection, etc., to be submitted fifteen days from today.
- August 14 (7) Filed Government's notice of readiness for trial.
- December 9 (8) Filed Court Stenographer's minutes of proceedings of 4/22/74.

1975

- May 2 (9) Filed Government's notice of motion and motion to set a date for trial for criminal trial calendar, ret. 5/12/75.
- May 12 (10) Filed Defendant's affidavit, notice of motion and motion to dismiss, ret. 5/12/75.
- May 15 (11) Filed Government's opposition to defendant's motion to dismiss Information.
- May 12 (12) Motion by Government to set date for trial. The Government is ready. Motion by defendant to dismiss. To be submitted by Friday of this week. Trial date to be fixed after motion decided.
- September 24 (13) Filed Government's notice of motion, motion with affidavit of service, to set a date for trial for Criminal Trial Calendar, ret. 10/14/75 - Rochester.

RELEVANT DOCKET ENTRIES.

1975

- October 14 (14) Motion by Government to set date for trial. Defendant requests non-jury trial. Trial date 10-23-75.
- October 20 (15) Filed Decision and Order - Government to furnish defendant evidence favorable to the defendant under the authority of Brady vs. Maryland; names of witnesses, be furnished to defendant by the Government, on or before 10/21/75; Defendant's motion for a bill of particulars, other than the names of witnesses and for complete and specific disclosure of the use by the government confidential informants is denied; Defendant's motion to dismiss the information, etc., denied; Case will proceed to trial without a jury on 10/23/75 in the event of an adverse decision on defendant's motion at the oral argument on 10/14/75-- BURKE, J.
- October 21 (16) Filed four subpoenas - Joseph Enzina, Ethel Kinsella, William R. Brennan served 10/17/75; Joseph Coppola, served 10/18/75.
- October 21 (17) Filed sixteen subpoenas (D.T.) - Jerome D. Adner, William P. Bellas - Ferdinand J. Ciccarelli, Dennis J. Kane, Frank N. Cuomo, James A. Garvey, William G. Willis, Dimitri J. Tzetzio, Warren W. Rothfus, Joseph M. Ralabate, Victor E. Manz, Anthony LaMastra, Robert T. Kistner, Herbert W. Holtz, William S. Gordon, Wayne D. Wisbaum, served 10/17/1975.
- October 23 (18) Case is moved ready for trial without a jury. Trial is Adj. until tomorrow. Burke, J.
- October 24 (19) Trial is continued from yesterday. Decision reserved. Briefs to be submitted.
- October 22 (20) Filed subpoena to testify for Frederick M. Marshall served on 10-22-75.
- October 23 (21) Filed one subpoena D/T for Robert Ludwig served on 10-22-75.
- October 28 (22) Filed two subpoenas D/T for Michael Pasquarella and Dominick Pardi, both served 10-23-75.

RELEVANT DOCKET ENTRIES.

1975

- December 16 (23) Filed Court Stenographer's transcript of Trial - 1 Volume (Retained in Rochester) (finding the defendant guilty as charged in the Information)

1976

- April 21 (24) Filed Decision findings of fact and conclusion of law, Burke, J. sentence - 5/10/76 - Rochester
- April 21 (25) Filed notice of motion and motion to vacate the judgment and to dismiss the Information and in the alternative for a new trial.
- April 26 (26) Motion by defendant to vacate judgment, etc. Submitted for decision.
- May 10 (27) Defendant is sentenced on Cts. 1, 2 as follows: The Court: I impose a fine of \$500 on each count; The defendant requests stay of the fine pending the filing of a notice of appeal. Granted.
- May 17 (28) Filed Court Reporter's transcript of proceedings on 4/26/76 (Filed in Rochester).
- May 19 (29) Filed Decision and order denying defendant's motion to vacate the judgment and to dismiss the Information, and for alternative relief of a new trial -- BURKE, J.
- May 19 (30) Filed Court Stenographer's transcript of sentence proceedings of 5/10/76.
- May 19 (31) Filed Judgment for defendant.
- May 13 (32) Filed Defendant's Notice of Appeal with Form A.
- May 20 (33) Copy of Notice of Appeal, mailed to U.S. Attorney, Defendant, and to the CCA with Statement of Docket Entries and Form A.

INFORMATION - filed 2-1-74.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	CR-74-44
	:	CR.NO.
Plaintiff	:	
	:	<u>I N F O R M A T I O N</u>
-vs-	:	
	:	Vio.: T. 26, U.S.C.,
JOSEPH C. VISPI,	:	\$7203
	:	
Defendant	:	

COUNT I

The United States Attorney charges:

That during the calendar year 1967, the defendant, JOSEPH C. VISPI, who was a resident of the Town of Amherst, State of New York, had and received a gross income of \$48,638.70; that by reason of such income he was required by law, following the close of the calendar year 1967 and on or before April 15, 1968, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Buffalo, New York, at Buffalo, New York, in the Western Judicial District of New York, or to the Director, Internal Revenue Service Center, North-Atlantic Region, Andover, Massachusetts, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

INFORMATION - filed 2-1-74.

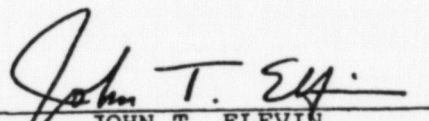
COUNT II

The United States Attorney further charges:

That during the calendar year 1968, the defendant, JOSEPH C. VISPI, who was a resident of the Town of Amherst, State of New York, had and received a gross income of \$52,808.50; that by reason of such income he was required by law, following the close of the calendar year 1968 and on or before April 15, 1969, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Buffalo, New York, at Buffalo, New York, in the Western Judicial District of New York, or to the Director, Internal Revenue Service Center, North-Atlantic Region, Andover, Massachusetts, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

Dated: Buffalo, New York, January 31, 1974


JOHN T. ELFVIN
United States Attorney

DEFENDANT'S MOTION FOR DISCOVERY AND
INSPECTION, etc., filed 4-24-74.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

JOSEPH C. VISPI,

Defendant.

NOTICE OF MOTION

Cr. No. 74-44

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of RICHARD E. MOOT, sworn to on the ^{23rd}~~2nd~~ day of April, 1974, and upon the Information and all the other proceedings had herein, the undersigned will move this Court on behalf of the defendant JOSEPH C. VISPI, at a Term of this Court to be held in the United States Courthouse in the City of Rochester, State of New York, on the ^{13TH}~~22nd~~ day of ^{MAY}~~April~~, 1974, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an Order granting the following relief:

1. Discovery and Inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure as more fully set forth in the attached affidavit;
2. A Bill of Particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure as itemized in the attached affidavit;
3. Delivery to the defeniant of all evidence favorable to him pursuant to the authority of Brady v. Maryland, 373 U.S. 83;
4. Complete and specific disclosure of the use by the government of any and all confidential informants;

*DEFENDANT'S MOTION FOR DISCOVERY AND
INSPECTION, etc., filed 4-24-74.*

5. An order reserving to defendant, the right to file other and further motions, the need for which may become apparent upon the granting of any or all the relief herein sought.

Dated: Buffalo, New York
April 23, 1974

Yours, etc.

OHLIN, DAMON, MCREY, SAWYER & MOOT
Attorneys for Defendant
Joseph C. Vispi
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Telephone: (716) 856-5500

TO: DAVID G. LARIMER, ESQ.
Assistant United States Attorney
United States Courthouse
Rochester, New York 14614

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

JOSEPH C. VISPI,

Defendant.

AFFIDAVIT

Cr. No. 74-44

STATE OF NEW YORK)
) SS.:
CITY OF BUFFALO)

RICHARD E. MOOT, being duly sworn, says:

1. I am a member of the firm OHLIN, DAMON, MOREY, SAWYER & MOOT with offices at 1800 Liberty Bank Building, Buffalo, New York, and represent the defendant, JOSEPH C. VISPI.

2. On or about the 1st day of February, 1974, an Information was filed in the United States District Court for the Western District of New York charging Joseph C. Vispi, on two counts with willful failure to file an income tax return for the years 1967 and 1968 in violation of the Internal Revenue Code: Title 26 U.S.C., section 7203.

3. On the 22nd day of April, 1974, defendant Joseph C. Vispi is scheduled to be arraigned before the Hon. Harold P. Burke and will enter a plea of not guilty.

4. The remainder of this affidavit is divided into different subheadings relating to the specific relief sought.

*DEFENDANT'S MOTION FOR DISCOVERY AND
INSPECTION, etc., filed 4-24-74.*

A. Discovery and Inspection

5. Defendant requires an order permitting him to inspect and copy or photograph the following items hereinafter designated which are in the possession, custody or control of the government on the grounds that they are material to the preparation of his defense and that this request for them is reasonable.

(a) A copy of any and all statements allegedly made by the defendant to any governmental agency, agent, or employee, whether state or federal.

(b) All records, notes, summaries, reports, logs, memoranda, TWX communications, airtels and written communications of any type or description made by any employee, agent or agency of the government which relate to the above-referenced statements and concern all of the matters contained in this Information or related thereto.

(c) The defendant's income tax returns as filed for the years 1965 to 1972 showing the date on which each return was received by the Internal Revenue Service and all correspondence sent to and received from the defendant by any governmental employee, agent or agency which relates to said returns, their filing or the charges herein.

(d) All documents, papers and tangible objects which the government intends to introduce into evidence at the trial in its case in chief.

(e) The names of all persons known to the prosecution or in the exercise of due diligence should be known to the prosecution who have knowledge pertaining to this case or who were interviewed by the authorities in connection with the case.

*DEFENDANT'S MOTION FOR DISCOVERY AND
INSPECTION, etc., filed 4-24-'74.*

(f) All statements, written and oral, of witnesses whom the prosecution interviewed but does not plan to call to testify at the trial of this case.

(g) In the event that there was any electronic surveillance conducted by the government or any other governmental agency or any state agency relating to any phase of the investigation of this case, the proceeds of that surveillance is requested including the contents of all such statements and conversations thus overheard, and all memoranda prepared in connection therewith.

*DEFENDANT'S MOTION FOR DISCOVERY AND
INSPECTION etc., filed 4-24-74.*

B. Bill of Particulars

6. Defendant, in order to prepare for and defend the charges herein, requires a bill of particulars setting forth the following:

(a) State specifically each act and omission or failure to act by defendant upon which the prosecution will rely to prove the allegation that the defendant did willfully and knowingly fail to make an income tax return for 1967 and 1968.

(b) State specifically and separately each and every other event or fact which the prosecution will claim indicates that the defendant violated section 7203, Internal Revenue Code.

(c) The names of the witnesses with knowledge of the facts to establish that the defendant did willfully and knowingly fail to make said income tax returns and whether or not the prosecution will rely on these witnesses at trial.

7. This information is sought to clarify the criminal charge against the defendant and is within the particular knowledge of the United States Attorney and cannot be obtained by means other than legal process.

8. The information requested is not of an evidentiary nature, and without it, the defendant cannot adequately prepare or conduct his defense. Furthermore, this information is required to prevent surprise at trial.

9. The instant Information merely recites conclusory allegations and lacks the degree of factual certainty which would enable the defendant to adequately prepare for his defense.

10. The defendant respectfully reserves the right to request other details to be furnished which are relevant to this Information and which are necessary for the proper preparation of his defense.

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In The
United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOSEPH C. VISPI,

Defendant-Appellant.

On Appeal From the Judgment of the
United States District Court
for the Western District of New York

**PLAINTIFF-APPELLEE'S PETITION FOR
REHEARING, WITH SUGGESTION FOR
REHEARING *EN BANC***

To the Honorable United States Court of Appeals for the Second Circuit and the Honorable Robert P. Anderson, Walter R. Mansfield and William H. Mulligan, Circuit Judges thereof:

The United States of America, plaintiff-appellee herein, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, respectfully petitions this Court for a rehearing of the above entitled case and respectfully suggests the appropriateness of rehearing *en banc*.

The decision complained of herein was a reversal of the conviction of Joseph Vispi for failure to file tax returns with

instructions to dismiss on the grounds that the defendant was denied his Sixth Amendment right to a speedy trial.

The United States of America, plaintiff-appellee (hereinafter the government) respectfully submits that this case should be reheard *en banc* because the case involves questions of exceptional importance. As dissenting Judge Mulligan points out, the panel's majority decision is the only "decision in this Circuit which concludes that although there was no violation of the time limitations provided by a district court's Plan for the Prompt Disposition of Criminal Cases, there was nonetheless a delay so egregious that the defendant's Six Amendment Constitutional right to a speedy trial was violated." (Slip Opinion p. 524)

In addition, the majority opinion herein applies the standards set by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972) in such a way as to eliminate two of the four factors set forth; the reason for the delay and prejudice to the defendant.

Another question of exceptional importance raised by this case concerns what is the government's obligation once it has filed its Notice of Readiness and has made motions to the district court on two separate occasions to fix a date for trial. The majority opinion imposes an intolerable burden on the government to do more and implies the prosecution should actually intrude on the province of the Court by, in effect, running the Court's calendar.

Finally, it is respectfully submitted the majority opinion apparently overlooked and misapprehended critical portions of the record, that is that the government did not merely rely on its Notice of Readiness but instead did press the Court for trial by filing motions for trial on two additional occasions. Also, as the dissent of Judge Mulligan points out, there was nothing in the record showing prejudice to the defendant. Rather, the record demonstrates the defendant was not prejudiced.

ARGUMENT

The majority opinion herein specifically found no violation of the Western District's Plan for the Prompt Disposition of Criminal Cases and yet, even though the government did not seek to delay this trial but rather moved it for trial two additional times after filing its Notice of Readiness, the majority opinion found a violation of the defendant's Sixth Amendment right to a speedy trial. The majority opinion purports to apply the standards of *Barker v. Wingo*, 407 U.S. 514 (1972) which establishes a balancing test "in which the conduct of both the prosecution and the defendant are weighed." 407 U.S. at 530.

The defendant herein never moved for trial but rather asserted his right in closing remarks in letters to the Court such as, "As soon as these matters are resolved and the calendar of the court permits, the defendant wishes to have this case set for trial." (App. p. 31) The government on the other hand had filed its Notice of Readiness and then on April 30, 1975 took affirmative action and moved the Court for a trial date (App. p. 19, 20). The defendant then answered the government's motion for trial with its motion to dismiss for lack of speedy trial. (App. p. 21) (In support of his motion defense counsel submitted a letter to the Court and stated the defendant consents to any delay required for the disposition of his motion. App. p. 35) While these motions were still pending the government pressed again for trial with the appropriate motion filed September 23, 1975 (App. p. 36) which motion resulted in the ultimate trial date. On balance therefore the government did precisely what the majority opinion said it should. If the majority opinion requires more, the government would be required to intrude on the court's province and run its calendar. This would be an intolerable burden on the government and an improper usurpation of the court's authority.

The majority opinion also eliminate or distorts two of the four factors enumerated in *Barker*, reasons for the delay and

prejudice to the defendant. Unlike *Barker* where the government caused the delays for tactical advantage by seeking 16 continuances, the government here has sought no continuances but pressed the court for trial. The delays in this case, as dissenting Judge Mulligan points out, were neutral, institutional delays and not deliberate. Yet the Supreme Court affirmed Barker's murder conviction and the majority opinion here reversed Vispi's misdemeanor conviction. By holding that since this was a simple misdemeanor case there was no good reason for the delay, the majority is suggesting that simpler cases should take calendar preferences over the more complicated cases. This is obviously not the intent of the Sixth Amendment.

As for prejudice to the defendant, the majority opinion either overlooked much of the record or chose to eliminate this factor. Judge Mulligan's dissent puts it another way, "the majority overstates the factor of prejudice to Vispi," and Judge Mulligan finds no support in the record for many of the claimed harms to Vispi (Slip Opinion p. 525). While admitting "specific handicaps . . . are difficult to pinpoint" the majority opinion purports to find some anyway without any support in the record.

The majority finds that the pending charges took their toll on Vispi's morale and reputation. Yet the record clearly shows that his morale was down as the result of his being forced out of a law office because his work habits were extremely slow. Also, four character witnesses testified that his reputation was very good even to that day of trial, in spite of the pending charges. (App. pp. 113, 308, 344, 345)

The majority finds that the delay prevented Vispi from finding records he needed for his defense and dimmed recollections. As Judge Mulligan's dissent points out this again ignores the record that by the end of the IRS investigation and long before the charges were filed Vispi knew what the proposed charges were, that the issue was wilfulness and at that time Vispi

was represented by a sophisticated New York City law firm which specialized in criminal tax matters (Slip Opinion p. 525). There is no support in the record that any delay hampered Vispi's preparation of this defense. As Judge Mulligan's dissent puts it, it is unrealistic to believe that Vispi's counsel was not prepared to defend this case long before any delay occurred. The majority opinion assumes that Vispi and his counsel did nothing to defend these charges or seek records and witnesses until after the trial began, when in fact the record shows they did all those things prior to any delay. The Supplemental Appendix shows the efforts to which Vispi and his counsel went prior to the filing of the charges in order to convince the government not to prosecute Vispi.

Judge Mulligan's dissent also points out that although Vispi claims his income for 1970 and 1971 was less than that for 1967 and 1968, the charges here were not filed until 1974 and could hardly be considered as the cause of a diminution of income in prior years. Also nowhere in the record is there any evidence of Vispi's income for 1970 and 1971. But assuming that it did decline, it can not be blamed on charges that were not yet filed. Vispi's witnesses all testified that his work habits were so poor that he was forced out of one office and clients were constantly complaining. This was the obvious cause of his declining income and not the long pendency of charges which hadn't yet been filed.

The majority overlooked the fact that Vispi's prosecution was transferred from Buffalo where he lived and worked to Rochester, New York and thereby the public scorn from the pending charges was reduced.

The majority opinion concluded that the 20 month delay in bringing this case to trial is sufficient to trigger the *Barker v. Wingo* inquiry because of all the circumstances, even though 20 months is not *per se* excessive. The circumstances that caused this conclusion were the pre-information delay and the post-trial

delay before the Court entered its finding of guilt. But the majority and dissent both find that the pre-information delay was to the benefit of the defendant who was attempting to dissuade the government from criminal prosecution.

It is respectfully submitted that the majority opinion also misapprehends the record as to the post-trial delay. The majority finds that Judge Burke, the trial Judge, had the decision under advisement for almost six months. But in fact Judge Burke had the matter under advisement for a little over one month. Defendant submitted his proposed findings on March 12, 1976 and Judge Burke ruled April 20, 1976 (App. p. 356, 358).

In *Barker v. Wingo*, 407 U.S. 514 (1972) the Supreme Court held that the murder conviction of Barker was not in violation of his Sixth Amendment rights in circumstances much worse than in this case. Applying the Supreme Court's guidelines to the record here, it is respectfully submitted the case should be reheard.

In regard to the conduct of the defense and prosecution, in *Barker* the prosecution deliberately caused delays for tactical advantage sixteen times and the defendant, although not very strongly, did object once and moved for dismissal. The Supreme Court still affirmed. In *Vispi* the government and defense both pressed for trial, the government by motions and the defense by letter and one motion to dismiss. The majority reversed.

In *Barker* the delay of a murder trial was 62 months, in *Vispi*, a misdemeanor tax charge, the delay was 20 months. Yet the Supreme Court affirmed *Barker* and the majority here reversed.

In *Barker* the reason for the delay was the government's deliberate efforts to delay. In *Vispi* the reason was solely institutional. Yet the Supreme Court affirmed *Barker* and the majority here reversed *Vispi*.

In *Barker* the Supreme Court discounts as minimal the prejudice to the defendant of being in jail for ten months and having murder charges pending against him for sixty-two months. Yet here where Vispi was never jailed the majority finds enough prejudice to reverse simply because misdemeanor charges were pending for twenty months. There's no other prejudice shown in the record. Rather the record shows there was no prejudice to the defendant.

CONCLUSION

It is respectfully submitted that the majority opinion herein raises questions of exceptional importance and upon the arguments set forth above the government respectfully petitions this Court to rehear this case *en banc*.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney for the
Western District of New York
Attorney for Plaintiff-Appellee
233 U.S. Courthouse
Rochester, New York 14614
Telephone: FTS 473-6760

EUGENE WELCH
Assistant United States Attorney
of Counsel

Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
Established 1908

11 Centre Park
Rochester, New York 14608
Correspondence: P.O. Box 6, 14601
(716) 232-6920

Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

December 13, 1976

Re: UNITED STATES OF AMERICA V VISPI

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

RICHARD J. ARCARA, U.S. ATTORNEY FOR THE WESTERN DISTRICT OF N.Y.
BY MR. EUGENE WELCH, ASST. U.S. ATTORNEY
Attorney(s) for

PLAINTIFF-APPELLEE

On December 13, 1976

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

OHLIN, DAVMON, MOREY, SAWYER & MOOT
1800 Liberty Bank Bldg.
Buffalo, NY 14202

ATTN: RICHARD E. MOOT, ESQ.
TERRENCE M. CONNORS, ESQ.

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a
Post Office maintained by the United States Government in the City of Rochester, New York.

☐ By hand delivery

Sworn to before me this 13th day of December 1976

Kathy A. Fanning
Notary Public
Commissioner of Deeds

LESTER A. FANNING
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1978